

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



74-1507

TO BE ARGUED BY  
CARL O. CALLENDER, ESQ.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- X

OTIS CLAY,	:	
	:	
Plaintiff-Appellant,	:	
	:	Docket Number
-against-	:	74/1507
	:	
DOCTOR WILLIAM R. MARTIN,	:	
DOCTOR PETER A. MANSKY, and	:	
DOCTOR DONALD R. JASINSKI,	:	
	:	
-and-	:	
	:	
THE UNITED STATES SURGEON GENERAL,	:	
THE UNITED STATES ATTORNEY GENERAL,	:	
THE DIRECTOR OF THE BUREAU OF PRISONS,	:	
	:	
-and-	:	
	:	
THE UNITED STATES,	:	
	:	
Defendants-Appellees	:	

----- X

ADDENDUM TO APPELLANT'S BRIEF IN OPPOSITION  
TO THE COURT ORDER DISMISSING THE INSTANT  
CAUSE OF ACTION ON THE MERITS

CARL O. CALLENDER, ESQ.  
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On The Brief:  
Carl O. Callender, Esq.  
Arthur Helton

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Defendants-Appellees :

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STATEMENT OF AUTHORITY TO DISPENSE WITH THE  
REQUIREMENTS OF AN APPENDIX IN THE INSTANT  
APPEAL

Pursuant to Federal Rule of Appellate Procedure  
30 (f) and § 30 (2) of the Supplemental Rules of  
the United States Court of Appeals for the Second Cir-  
cuit, the instant appeal is to be heard on the original  
record without the necessity of an appendix as a pro-  
ceeding conducted in forma pauperis.



DOCKET ENTRIES CONTITUTING THE ORIGINAL RECORD IN THE PROCEEDINGS BELOW.

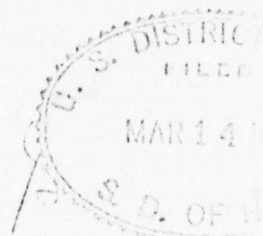
1. Complaint pro se and Order granting Plaintiff leave to proceed in forma pauperis
2. Summons and Proof of Service
3. Answer
4. Plaintiff's memoranda
5. Plaintiff's Interrogatories
6. Affidavit of Service of Interrogatories
7. Stipulation and Order extending time to answer Interrogatories
8. Answer to Interrogatories
9. Further Answer to Interrogatories
10. Order of Dismissal for Failure of Plaintiff to appear at Pre-trial Conference
11. Plaintiff's Notice of Motion and Affirmation for Relief from Order of Dismissal
12. Order of Relief from Order of Dismissal by Ryan, J.
13. Notice of Appearance of Attorney for Plaintiff
14. Amended Complaint
15. Answer to Amended Complaint
16. Plaintiff's Notice of Demand for Jury Trial
17. Plaintiff's Notice of Motion, Affirmation and Affidavit for leave to file Amended Complaint/ Endorsement of Dismissal by Ryan, J.

18. Defendants' Notice of Motion to Dismiss and Affidavit and Memorandum of Law in support of Motion to Dismiss/Endorsement of Dismissal by Ryan, J.
19. Plaintiff's Affirmation in oppositon to Motion to Dismiss
20. Judgment
21. Notice of Appeal, Memorandum, and Endorsement granting leave to appeal in forma pauperis
22. Certificate of the Clerk of the District Court.



OTIS CLAY v. DOCTOR WILLIAM R. MARTIN et al.

Endorsement  
71 civ. 2306



This action was commenced by the filing of a Pro Se complaint on May 24, 1971; defendants answered this complaint on August 1971. Thereafter, plaintiff did nothing to prosecute the action until August 14, 1973 when, through his attorney, he served interrogatories, which defendants thereafter answered.

This action was dismissed for lack of prosecution on January 26, 1973. The order of dismissal was later vacated "with leave to the plaintiff to file, within twenty-five days...an amended complaint containing a short, concise statement of plaintiff's claim." Although plaintiff filed what he calls an amended complaint on January 4, 1974, it differs in no respect with the prior complaints of plaintiff. All of plaintiff's complaints are defective as to venue, subject matter, jurisdiction and improper parties as stated in the defenses which were set forth and pleaded in the ten affirmative defenses which were filed as an answer to plaintiff's now vacated complaint on January 23, 1974.

The plaintiff again moves for leave to file a further amended complaint, and this motion is opposed by the United States Attorney representing the named defendants, and the United States Attorney also moves to again dismiss the action.

Upon the file and record, the plaintiff's motion to file a further amended complaint is denied and defendants' motion to dismiss is granted. The Complaint is dismissed upon the merits and the court is directed to enter such judgment promptly without further proceedings.

So ordered.

Dated: March 11, 1974.

*[Signature]*  
SEYMOUR J. RYAN  
U.S.D.J.

ONLY COPY AVAILABLE

TABLE OF AUTHORITY

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<u>Erie R.R. v. Tompkins</u> , 304 U.S. 64 (1938)	8
<u>Ferraioli v. Cantor</u> , 259F. Supp. 842 (S.D.N.Y. 1966)	1
<u>Foman v. Davis</u> , 371 U.S. 178 (1962)	2 & 21
<u>Foster v. Leggett</u> , 484 S.W. 2d 827 (KY. 1972)	8
<u>Gibson v. United States</u> , 457F. 2d 1391 (3rd Cir. 1972)	18
<u>Gregorie v. Biddle</u> , 177F. 2d 579 (2d Cir. 1949) <u>cert. denied</u> 339 U.S. 949 (1950)	12



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<u>Ripperger v. Allyn</u> , 113F. 2d 332 (2d Cir. 1940) <u>cert. denied</u> , 311 U.S. 695 (1940)	1
<u>Shedd Brown Mfg. Co. v. Tichenor</u> , 257 S.W. 2d 894 (KY. 1953)	9
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<u>Wessling v. Paris</u> , 417 S.W. 2d 259 (KY. 1967)	8
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<u>SECONDARY AUTHORITY</u>	
J. <u>Moore</u> , <u>FEDERAL PRACTICE</u> (2 ed. 1974)	1,2,8 & 21
Mulford, <u>Experimentation on Human Beings</u> , 20 Stan. L. Rev.99 (1967)	14 & 19
W. Wright, <u>The Federal Tort Claims Act</u> , (1957)	16
W. Wright, <u>The Federal Tort Claims Act</u> , (Supp. 1959)	17

## CORRIGENDA

1. page i, title "ISSUES" instead of "ISSUE"
2. page i, POINT V, line 2 "AT" instead of "OF",  
"STAGE" instead of "STAGES" -  
line 3 "?" instead of "."
3. page ii, line 4 "the appellant," inserted after "Otis Clay"-  
line 7 "title" instead of "tittle"
4. page iii, line 3 "in" instead of "is" - line 12 "short"  
instead of "shot", "plaintiff's" instead  
of "plaintiffs" - line 17 "proposed" in-  
serted before "amended complaint", "alleges"  
instead of "alleged" - line 18 "alleges in-  
stead of "alleged"
5. page iv, line 3 "defendants" instead of "defendant" - line  
5 "defendants" instead of "defendant",  
", Assistant United States Attorney," in-  
serted after "William S. Brandt" - line  
6 "." after "1974"- line 7 "denied plain-  
tiff's application for leave to file an  
amended complaint and" inserted after  
"district court" in line 7 - line 8 "Ryan,  
J." instead of "Ryan J."
6. page v, line 7 "attack" instead of "attach"
7. page 1 line 9 "1630" instead of "1631", insert "2" before  
"ed." - line 12 insert "(Supp. 1974)"  
after "\$§ 1391"
8. Insert "Judiciary and Judicial Procedure" for "Judiciary  
Code" wherever appearing



9. "U.S.C." citations are to the United States Code  
Annotated wheresoe~~ver~~ appearing
10. page 2, line 9 insert "3" before "J. MOORE"  
line 10 insert "2" before "ed."
11. page 5, line 6 insert "subject matter" and before  
"jurisdiction"-line 8 ", in fact,"  
instead of "in fact"
12. page 7, line 1 insert "and (2)" after "\$§ 4001 (b) (1)"
13. page 8, line 3 insert "(1969)" after "\$ 4005 (a)"
14. page 8, footnote 2, line 4 "[section 4005]" instead of  
"[section 4004]"
15. page 8, footnote 5, line 12 insert "2" before "ed." and  
"4" after "197"
16. page 9, insert "(1962)" after "\$ 1346 (b)" in last line  
of quotation.
17. page 9, line 13 "undertaking" instead of "undertakings"
18. page 11 "\$ 233 (a)" instead of "\$ 233 (2)" in line 1  
following quotation
19. page 12, line 7 "320" instead of "319"- line 19 insert  
"(1950)" after "949" - line 20 "no-" in-  
stead of "no"
20. page 13 "litmus" instead of "litmos" in line 1 of  
quotation - insert "7" after "82" and  
"1963" within parentheses
21. page 14, line 2 "Mulford" instead of "Mulfact's"
22. page 16, line 8 "(1962)" instead of "(1962)"- line 15  
"... [their]" instead of "his"

23. page 17, footnote 8, line 2 "The" instead of "the"
24. page 18, line 8 insert "15" after "346 U.S." - line 9  
"Co." instead of "Company" - line 10  
"F.2d" instead of "Fed."
25. page 18, footnote 8 "of... misrepresentation" instead  
of "of misrepresentation."
26. page 19, line 1 "F.2d" instead of "Fed." - line 6  
"c.f." instead of "In", "F.2d" instead  
of "Fed."
27. page 20, line 10 insert "5" after "267"
28. page 20, footnote 9, line 1 insert "1" after "§ 240"
29. page 20 and 21, footnote 9-quotation marks should  
appear around the provisions of 28 U.S.C.  
A § 2675 (a)
30. page 21, line 7 insert ";" before "Foman"- line 8 in-  
sert ";" before "J. MOORE"
31. page 23, title, line 2 "AT" instead of "OF", "STAGE"  
instead of "STAGES"-line 3 "?" instead of  
"." - line 17 "venue" instead of "venoe"
32. page 24, line 5 quotation marks appear around the  
phrase:"cannot reasonably be required to  
frame a responsive pleading"
33. page 24, line 6 insert "answered with particularity the  
complaint filed by the plaintiff on  
January 3, 1974. The defendants" before  
"did"



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7/12/74